

**STATE MINING AND GEOLOGY BOARD****DEPARTMENT OF CONSERVATION**

801 K Street • Suite 2015 • Sacramento, California 95814

PHONE: 916 / 322-1082 • FAX: 916 / 445-0738 • TDD: 916 / 324-2555 • INTERNET: conservation.ca.gov/smgb**IGNACIO GONZALEZ, CHAIR**
JELISAVETA GAVRIC, VICE CHAIR**TOM BARRY**
JOHN LANE
DAN REDING**GEORGE KENLINE**
NEGAR NOUSHKAM**In the Matter of:****Intent to Appeal by Friends of the Kings River of the County of Fresno's
Approval of a Conditional Use Permit Permit and Reclamation Plan
Within a Mineral Designated Resource Area**

Petitioner Friends of the Kings River (Friends) on August 16, 2013, filed with the State Mining and Geology Board (SMGB) an Intent to Appeal a decision by the County of Fresno (County) to approve a reclamation plan and Conditional Use Permit for the Carmelita Mine and Reclamation Project (Project) on land designated by the SMGB to contain regionally significant mineral resources on the grounds that the permit and reclamation plan for the Project were not in compliance with the Surface Mining and Reclamation Act (SMARA) and the County's Zoning Ordinance 858. Friends have petitioned the SMGB to take jurisdiction for the appeal pursuant to SMARA, and specifically, PRC Section 2775(a).

Statutory and Regulatory Authority**PRC Section 2775:**

Under the provisions of SMARA, the SMGB has authority to designate in regulation specific geographic areas of the State of California as having statewide or regional mineral significance (ref. PRC Section 2790). Public Resources Code (hereinafter PRC) Section 2775(a) provides an opportunity to appeal to the SMGB to any person who is aggrieved by the granting of a permit to conduct surface mining operations in an area of statewide or regional significance. Specifically, PRC Section 2775 et seq. states:

"(a) An applicant whose request for a permit to conduct surface mining operations in an area of statewide or regional significance has been denied by a lead agency, or any person who is aggrieved by the granting of a permit to conduct surface mining operations in an area of statewide or regional significance, may, within 15 days of exhausting his rights to appeal in accordance with the procedures of the lead agency, appeal to the board.

(b) The board may, by regulation, establish procedures for declining to hear appeals that it determines raise no substantial issues.

(c) Appeals that the board does not decline to hear shall be scheduled and heard at a public hearing held within the jurisdiction of the lead agency which processed the original

application within 30 days of the filing of the appeal, or such longer period as may be mutually agreed upon by the board and the person filing the appeal. In any such action, the board shall not exercise its independent judgment on the evidence but shall only determine whether the decision of the lead agency is supported by substantial evidence in the light of the whole record. If the board determines the decision of the lead agency is not supported by substantial evidence in the light of the whole record it shall remand the appeal to the lead agency and the lead agency shall schedule a public hearing to reconsider its action."

The SMGB has, pursuant to PRC Section 2775(b), established procedures in 14 CCR (hereinafter CCR) Section 3625 et seq. for processing such appeals. Section 3626 states:

"Any person filing an appeal to the Board pursuant to PRC 2775 shall, within 15 days of exhausting his or her rights to appeal in accordance with the procedures of the lead agency, file an intent to appeal by submitting the following information. Failure to submit all the required, completed documents to the Board within the 15 day filing period will result in an incomplete filing of intent and an automatic rejection of the appeal...."

CCR Section 3627 provides three criteria upon which the Chairman shall make a decision as to accepting or denying a hearing on the appeal:

"(a) Whether the appeal raises any issues which legally can be addressed by the Board within the limits of the Public Resources Code and the rules of the Board; and,

(b) Whether the appeal specifically relates to the approval or denial of a permit to conduct surface mining operations in an area designated by the Board as being of statewide or regional significance.

(c) Whether the appeal is that of a lead agency's reconsideration of an appeal previously remanded by the Board to that lead agency, and the appellant's challenge raises no new substantial issues with respect to the action taken by the lead agency to approve or deny the permit to conduct surface mining operations."

Description of Proposed Project Area

The proposed project site is within the jurisdictional boundaries of the County of Fresno and is within an area of statewide or regional significance. Specifically, the subject area is located within Sector K of the Fresno Production-Consumption Region (CCR Section 3550.13). Most of the site is currently in fruit plant production. The project is an aggregate surface mine with related processing plant, concrete and asphalt plants, and a recycling plant, situated on 886 acres of a 1,500-acre site which is further comprised of 14 parcels to be operated by Carmelita Resources. The remainder of the site comprising 614 acres will continue as fruit production. The project incorporates the gradual excavation of 22 different cells or pits to a depth of 50 feet which will intersect groundwater. The Project is anticipated to have a maximum production rate of 1.25 million tons of aggregate per year, with an operating life of 100 years.

The reclamation plan calls for backfilling up to 240 acres of the 886 acres to be mined, which then will be reclaimed for agricultural purposes. Depending on the amount of available fill, up to 646 acres of the site will be left as open pits or water basins.¹ Notably, being in close proximity to the Reedley

¹ According to the Environmental Impact Statement for the project, "a maximum of 583 acres may be permanently removed from agricultural production . . ."; in contrast, the reclamation plan states that mining will occur on 886 acres, with "approximately 240 acres (depending on actual availability of materials)..." backfilled.

Municipal Airport, the water basins will need to be maintained devoid of vegetation and habitat value in perpetuity to reduce potential risk to aircraft striking birds near the airport.

The County is the lead agency under SMARA for all surface mining operations within its jurisdiction. A summary of pertinent actions taken by the County, the appellant, Friends (Friends) of the Kings River, OMR and SMGB, are summarized in chronological order below:

Table 1 Summary of Pertinent Chronological Actions	
Date	Action
Initial Intent to Appeal	
July 9, 2012	OMR provides the County with comments following its review of a proposed reclamation plan for the subject site.
July 10, 2012	County response to OMR's comment of July 9, 2012
August 1, 2012	OMR based on the County's July 10, 2013, response, relays to County that proposed reclamation meets the minimum requirements of SMARA and the SMGB's regulations.
August 8, 2013	OMR noted certain Conditions of Approval required before the proposed reclamation plan can be deemed complete
August 9, 2012	Fresno County Planning Commission considers the Project and approves the reclamation plan and conditional use permit and Friends files an Appeal to the County's Board of Supervisors
October 16, 2012	Board of Supervisors denies appeal and approves the Project
October 30, 2012	Friends appeal approval of the original reclamation plan and conditional use permit to the SMGB
Second Intent to Appeal	
March 14, 2013	SMGB granted the appeal on procedural grounds and remanded the reclamation plan back to the County
May 22, 2013	Following review of the amended reclamation plan provided by the County to OMR, OMR forwards comments on reclamation plan to County
June 7, 2013	County responds to OMR that OMR's comments have been adequately addressed
July 5, 2013	OMR indicates to County that its concerns have not been adequately addressed
July 9, 2013	County Board of Supervisors approves amended reclamation plan
August 6, 2013	County Board of Supervisors approve the amended reclamation plan and its associated supplemental CEQA review
August 9, 2013	Friends forwards notice to County of its intent to appeal
August 19, 2013	SMGB receives Friends' intent to appeal

Previous Actions

Initial Appeal: Friends' initial appeal raised several issues. One was whether the performance standards established and approved by the County as part of their approval of the Reclamation Plan and Conditional Use Permit application could be deemed as stringent or more stringent than what is provided under CCR Section 3705 (Performance Standards for Revegetation), CCR Section 3706 (Performance Standards for Drainage, Diversion Structures, Waterways, and Erosion Control), CCR Section 3707 (Performance Standards for Prime Agricultural Land Reclamation), and CCR Section 3708 (Performance Standards for Other Agricultural Land).²

Other issues focused on whether the reclamation plan, as approved, was adequate or complete in light of OMR's comments to the lead agency during the planning process. In OMR correspondence dated August 8, 2012, OMR reiterated and clarified its earlier comments provided in correspondence dated July 9, 2012, and August 1, 2012. Notably, it is stated that "OMR's position is that the reclamation plan will not be considered complete until the operator complies with the following specific conditions from the County's July 10, 2012 letter (Attachment), prior to the commencement of mining activities:

- Condition of Approval from County Response #4.
- Condition of Approval from County Response #6.
- Condition of Approval from County Response #7."

Another question raised was whether establishment of water basins with habitat value of zero, or even negative value, could be characterized as reclamation adequate under SMARA. More specifically, the issue was whether the proposed end use, without sufficient supportive analysis and documentation, met the intent of SMARA and the definition of reclamation. The intent of SMARA is provided pursuant to PRC Section 2712 which states "It is the intent of the Legislature to create and maintain an effective and comprehensive surface mining and reclamation policy with regulation of surface mining operations so as to assure that:

(a) Adverse environmental effects are prevented or minimized and that mined lands are reclaimed to a usable condition which is readily adaptable for alternative land uses.

(b) The production and conservation of minerals are encouraged, while giving consideration to values relating to recreation, watershed, wildlife, range and forage, and aesthetic enjoyment.

(c) Residual hazards to the public health and safety are eliminated."

Furthermore, SMARA defines reclamation pursuant to PRC Section 2733 as "the combined process of land treatment that minimizes water degradation, air pollution, damage to aquatic or wildlife habitat, flooding, erosion, and other adverse effects from surface mining operations, including adverse surface effects incidental to underground mines, so that mined lands are reclaimed to a usable condition which is readily adaptable for alternate land uses and create no danger to public health or safety. The process may extend to affected lands surrounding mined lands, and may require backfilling, grading, resoiling, revegetation, soil compaction, stabilization, or other measures."

² CCR Section 3700(b) states:

"Where an applicant demonstrates to the satisfaction of the lead agency that an exception to the standards specified in this article is necessary based upon the approved end use, the lead agency may approve a different standard for inclusion in the approved reclamation plan. Where the lead agency allows such an exception, the approved reclamation plan shall specify verifiable, site-specific standards for reclamation. The lead agency may set standards which are more stringent than the standards set forth in this Article; however, in no case may the lead agency approve a reclamation plan which sets any standard which is less stringent than the comparable standard specified in this Article."

At its March 14, 2013, regular business meeting and hearing of the initial appeal, the SMGB heard arguments on various issues, including:

- Whether excavating an open pit that intersected groundwater can simply be characterized as a groundwater basin;
- Whether the proposed water basins constituted an appropriate end use in accordance with SMARA;
- Whether the planned basin slopes would be stable under saturated conditions;
- Whether the open pits of groundwater to be maintained devoid of vegetation and habitat value (i.e., negative habitat value) was consistent with the intent of SMARA;
- Whether reclamation for perpetuity was consistent with the intent of SMARA; and
- Absence of an adequate water balance analysis questioned the adequacy of such as an end use.

Without deciding any of the substantive issues presented by the appeal, the SMGB determined that the record presented needed augmentation from the lead agency before the SMGB could adequately assess those issues. Accordingly, the SMGB granted the appeal on this procedural basis only, and remanded it to the lead agency to provide an opportunity for the parties to address the issues more completely.

Second Appeal: After the SMGB remand of the initial reclamation plan to the County, the operator subsequently prepared an amended reclamation plan, referred to as the Carmelita Mine & Reclamation Project, Environmental Impact Report No. 6174 (State Clearinghouse No. 2010081037) and Conditional Use Permit No. 3287, which was approved by the County Board of Supervisors on July 9, 2013, and subsequent findings approved by the County Board of Supervisors on August 6, 2013. Following the County's approval of the amended reclamation plan and supplemental CEQA review, Friends forwarded its second Appeal which was received on August 16, 2013.

Analysis

Completeness of Appeal Under PRC Section 2775(a):

1. The Intent to Appeal was timely filed with the SMGB Pursuant to PRC Section 2775(a):

When the County Board of Supervisors finally adopted findings for approval of the amended reclamation plan and supplemental CEQA review on August 6, 2013, Friends' appeal rights to the County Board thereby were exhausted. Friends' Intent to Appeal to the SMGB was received at the SMGB's office on August 16, 2013, within 15 days of exhausting its rights to appeal in accordance with PRC Section 2775(a).

2. The appeal raises substantial issues that can legally be addressed by the SMGB within the limits of the Public Resources Code and the rules of the SMGB pursuant to CCR Section 3627(a):

The SMGB may address permitting issues that involve designated mineral lands. Friends' appeal contends that the County's approval of the Conditional Use Permit and Amended Reclamation Plan as submitted by Colony Land Group LP was not in compliance with SMARA and the SMGB's regulations for the following reasons:

- Since insufficient data and analysis was provided to support the conclusions pertaining to slope stability, the approval is in conflict with CCR Section 3704(d)(f).
- Since the engineered grading and drainage plan and the calculated water balance for the project fail to provide adequate information regarding slope stability and probable water content of the mining pits, the approval is in conflict with CCR Section 3502(b)(3).

- Since more than 600 acres will not be reclaimed to a usable condition, and the proposed reclamation will harm the watershed and create public health and safety hazards, the approval is in conflict with PRC Section 2733 and 2712(a), 2712(b) and 2712(c).
- Since the Project will not result in the “*subsequent beneficial use of the mined and reclaimed land*,” the approval is in conflict with PRC Section 2711(b)
- Since the amended reclamation plan fails to clearly identify how reclamation would be completed, how the project area will transition to any subsequent beneficial use, and how perpetual operation and maintenance of the reclaimed area will be achieved, the approval is in conflict with PRC Section 2711(b).
- Because approximately 600 acres of prime and important agricultural lands will not be reclaimed to produce any crops, and may or may not perform the dubious “*function*” identified as “*water basins*”, the approval is in conflict with CCR Sections 3707 and 3708.

The appellant also claims that pursuant to PRC Section 2774(d)(2), OMR provided formal comment on the amended reclamation plan, and the County failed to either adopt the comments, or explain in detail why the County proposed not to adopt the comments.

The foregoing issues can legally be addressed by the SMGB within the limits of the Public Resources Code and the rules of the SMGB pursuant to CCR Section 3627(a).

3. The appeal relates specifically to the lead agency’s approval or denial of a permit to conduct surface mining operations in an area designated by the SMGB as being of statewide or regional significance pursuant to CCR Section 3627(b): The appeal directly relates to the County’s approval of a Conditional Use Permit and Reclamation Plan within an area designated by the SMGB (Section K; Updated Designation of the Fresno Production-Consumption Region (1999).

4. The appeal is from a lead agency’s reconsideration of an appeal previously remanded by the SMGB to that lead agency. The SMGB, in granting the prior appeal on procedural grounds only, did not resolve any of the substantive issues raised by Friends’ initial appeal. To the extent this second appeal reiterates issues raised but not determined by the first appeal, those issues, which are substantial, must be seen as new issues for the SMGB’s consideration.

CCR Section 3627(c) requires the Chairman of the SMGB to determine whether an appeal of a lead agency’s reconsideration of an appeal previously remanded by the SMGB to that lead agency raises new substantial issues or simply reiterates issues which had been determined by the SMGB in the initial appeal.

The requirements of CCR Section 3627(c), summarized above, have provoked some confusion regarding their content. The SMGB has received arguments from the project proponents, Colony Land Company, L.P., contending that Friends’ second appeal should be dismissed by the Chairman for failure to comply with this regulation, on the grounds that the issues raised by the appeal are neither “new” nor “substantial”. The arguments are misplaced.

It is true that at least some, if not all, of the issues raised by Friends’ appeal were also raised in Friends’ first appeal. Had the SMGB resolved those issues in that first appeal, and then remanded its decision to Fresno County, and Fresno County then had acted in accordance with SMGB’s resolution of those issues, then a second appeal on those issues would fail under CCR Section 3627(c). However, the SMGB, as noted, did not address any of Friends’ substantive issues in the first appeal. Thus, in all cases, the issues raised in Friends’ second appeal, after remand, are presented to the SMGB as “new” issues pursuant to the operative regulation.

The project proponents also argue that Friends' issues are not "substantial", offering reasons why, on the merits, the appeal should fail. These arguments are premature. The SMGB Chairman's determination of jurisdiction is **not** a determination of the merits of the appeal. The pertinent question here is simply whether the issues set forth in Friends' appeal are substantial, i.e., not frivolous or illusory, but important, even essential to the matter. The attention and efforts given to these issues by all parties to date sufficiently demonstrates that they meet the "substantial" test of the regulations, but aside from that, their significance to the project is evident in terms of how any resolution of them will impact that endeavor, perhaps even to the point of determining success or failure of the enterprise.

In determining that the issues are both new and substantial for purposes of deciding that the SMGB has jurisdiction over the Friends' second appeal, it is important to re-state that undertaking to **hear** the appeal is not a decision to **decide** the appeal. In truth, the exercise of jurisdiction demands a very low level showing, whereas the determination of the outcome of the appeal itself must be based on the entire record of the proceedings before the lead agency as well as the arguments of the parties to the matter. Further, the SMGB, in deciding the appeal, will "not exercise its independent judgment on the evidence but shall only determine whether the decision of the lead agency is supported by substantial evidence in the light of the whole record." (PRC Section 2775(c)).

Conclusion

In light of the foregoing and the body of evidence submitted by Friends of the Kings River, with its Intent to Appeal, the Chairman concludes that:

The SMGB does have jurisdiction under PRC Section 2775 to consider the Friends' appeal that the County's decision to approve a Reclamation Plan and Conditional Use Permit application was in conflict with SMARA and the SMGB's regulations.

Decision

The Friends' appeal under PRC Section 2775 is **accepted**.

Friends of the Kings River is requested to provide to the State Mining and Geology Board, pursuant to Title 14, California Code of Regulations, Article 4, Section 3628; and, Title 14, California Code of Regulations, Article 5, Section 3652, all the documents that constitute the Administrative Record for the appeals. The appeals will not be considered filed until the Administrative Record is complete.



Ignacio Gonzalez, Chairman
State Mining and Geology Board

Date: August 28, 2013